IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN, d/b/a/ LAWRENCE E. FELDMAN AND Associates,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION No. 06-cv-2540
GOOGLE, INC.,	:	
Defendant.	:	

PLAINTIFF'S REPLY TO GOOGLE'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

Plaintiff Lawrence E. Feldman (hereinafter "Plaintiff"), hereby replies to Defendant Google's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment as follows.

1. Google puts the cart before the horse on the issue of contract formation. Plaintiff disputes that he has ever personally signed a contract with Google to litigate disputes in Santa Clara County, California. The alleged contract which defendant asserts fails to identify a date at which point the contract was signed. Additionally it does not include any pricing information for the contested services. *See* page 1 of Defendant's Memorandum of Law in Support of it's Opposition to Plaintiff's Motion for Summary Judgment. (A true and correct copy of the Defendant's Memorandum is attached hereto as "Exhibit A").

2. Plaintiff brings this action for a breach of implied contract. Defendant continuously references a breach of contract claim that is no long a component of this litigation. *See* page 2, 3, 5, 7, and 13 of Exhibit A.

Dockets.Justia.com

3. Plaintiff maintains that the forum selection clause is unenforceable as a matter of law, since, as applied in the case of a billing dispute, the matter is prohibitively expensive in consideration of the monetary amounts in dispute. *See* page 2 of Exhibit A, whereas Google argues that this litigation would not be prohibitively expensive compared to any likely judgment if this suit were to transferred to California based on Plaintiff's inability to personally litigate in that state due to health concerns. *See* page 12 of Exhibit A.

4. Despite defendant's position that the contract alleged against the Plaintiff was reached through negotiation, according to Google's own sworn declaration of its employee, Ms. Hsu, no potential advertiser such as Plaintiff could set up an account and purchase Adwords if they do not completely assent to all of the contract's terms without the possibility of compromise or negotiation. *See* Exhibit A, Declaration of Google, Inc. Representative Annie Hsu page 3.

5. Defendant's reference to Plaintiff "recently serv[ing] as lead counsel in... Novacheck v. CIGNA (C.D. Cal. 95-3566)," a case pending in Los Angeles is not true. Litigation in Novacheck v. CIGNA ended in 1996. *See* page 2 of Exhibit A. Plaintiff has not personally litigated in California since that time, but through local counsel or referral. Also, Plaintiff is clearly not "a personal injury lawyer", but a general practitioner.

6. Plaintiff's opted out from a class action suit against defendant Google which was conducted and settled in Arkansas.[1] Plaintiff takes the position that his due process is violated by forcing him to litigate in California, because Fed.R.Civ.P Rule 23(e) which requires that class members be given information "needed to decide,

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[1] See *Lane's Gifts and Collectibles, LLC. v. Yahoo! Inc.*, Case No. CV-2005-52-1 (Ark. Cir. Ct. complaint filed Feb. 17, 2005),

intelligently, whether to stay in or opt out." *Amchem Prods. v. Windsor*, 521 U.S. 591, 628, (1997). Plaintiff was never notified when he opted out that he would have to litigate his claim in California.

7. The forum selection clause asserted by Google would be unenforceable as an adhesion contract under California law as well. In *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) the plaintiffs sued over various deficiencies in PayPal's service. PayPal responded that, in order to obtain a PayPal account, a subscriber must click a box stating that he or she "ha[s] read and agree[s] to the User Agreement," and that the Agreement contained an agreement to arbitrate. Id. at 1169. Thus, it argued, the case should be dismissed pursuant to that arbitration provision. Without deciding whether or not the parties had entered into a contract the Court went on to hold the agreement unconscionable. The court held the contract procedurally unconscionable because it was a contract of adhesion. Id. at 1173. Moreover, the court held, that the contract was substantively unconscionable due to its unilateral terms. The small amount in controversy and the fact that the agreement required the arbitration to take place in Santa Clara County, California-"PayPal's backyard"-resulted in the Court finding the contract to be substantively unconscionable as well.

8. In *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002) the Court evaluated the enforceability under California law of an agreement to arbitrate contained in a "clickwrap" contract. The Court held that the provision was unenforceable because the users had not actually assented to the agreement. The Court found that the "plaintiff's apparent manifestation of consent was to terms contained in a document whose contractual nature was not obvious." *Id.* at 31 (citations omitted). This is despite the fact that "given the position of the scroll bar on their computer screens,

plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms." *Id.* at 31-32.

The Court noted that a user could not view the terms of the license agreement without scrolling down. Thus, it was possible for a user to download the program without ever having viewed the license terms. The court concluded, a "reasonably prudent" user "would [not] have known of the existence of license terms." *Id.* at 31.

The Adwords "clickwrap" contract that Defendant now seeks to assert against Plaintiff is structured in a highly similar manner to the one that the court in *Specht* found to be unenforceable. Only the beginning of the program terms are shown and these do not include a forum selection agreement in Santa Clara County, California. *See* Exhibit A, Declaration of Google, Inc. Representative Annie Hsu page 2.

For the above mentioned reasons Plaintiff Feldman respectfully requests that this Court grant the Motion for Summary Judgment.

Respectfully submitted,

LAWRENCE E. FELDMAN & ASSOCIATES

By: ______________________

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN d/b/a LAWRENCE E. FELDMAN & ASSOCIATES	:	No. 06-cv-2540
v.	:	
GOOGLE, INC.	:	

ORDER

AND NOW, this _____ day of ___________, 2007 upon consideration of the Motion of Plaintiff Feldman for Summary Judgment, and any response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED.

BY ORDER OF THE COURT

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HONORABLE JAMES T. GILES
Judge, United States District Court

Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN, d/b/a LAWRENCE E. FELDMAN and ASSOCIATES,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

Civil Action No. 06-cv-2540

RECEIVED JAN 10 2007

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GOOGLE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Google, Inc. ("Google") submits the following Memorandum in support of its Opposition to Plaintiff Lawrence E. Feldman's Motion for Summary Judgment.

I. INTRODUCTION

Forum-selection clauses must be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that the party seeking the non-contractual forum will for all practical purposes be deprived of his day in court." *Anastasi Bros. Corp. v. St. Paul Fire and Marine Ins. Co.*, 519 F. Supp. 862, 863 (E.D.Pa. 1981) (Giles, J.), *quoting M/S Bremen v. Zapata OffShore Co.*, 407 U.S. 1, 18 (1972). Plaintiff Lawrence Feldman—an attorney who, on his website, touts himself as "a pioneer in computer law, internet law, consumer class actions, . . . entertainment law" and other subjects—alleges that he signed a contract with Google that requires all disputes to be litigated in Santa Clara County, California. This clause is valid and enforceable and, under *Anastasi Bros.* and other authority, it requires that this action be dismissed so that Feldman can proceed in the agreed forum. Google's pending motion to dismiss, filed on August 28, 2006, asks the Court to order this relief.

To try to forestall the result that the contract requires, however, Feldman has thrown up two procedural roadblocks. First, he filed an amended complaint that asserts a claim for breach of *implied* contract—rather than breach of contract, as his original, verified complaint did—and argued that, because he pled non-contractual claims in his second pleading, the Court may ignore the forum-selection clause that the parties agreed to. *See* Plaintiff's Resp. to Defendant's Supp. Memorandum in Support of Mot. to Dismiss Am. Compl. ["Pl. Response"] at 1-2. This ploy, however, cannot overcome a contractual forum-selection clause. *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988) (applying a forum-selection clause to a complaint that pled only tort claims, and noting that, if it did not do so, a litigant could avoid "a forum selection clause by simply pleading non-contractual claims."); *DeJohn v. The .TV Corporation Int'l,* 245 F.Supp.2d 913, 918 (N.D. Ill 2003) (holding, under facts similar to those in this case, that the plaintiff cannot proceed under an implied-contract theory because an enforceable contract governs the parties' relationship).

Second, Feldman has now moved for "summary judgment" that the contract he agreed to with Google is unenforceable, relying on the supposed unfairness of several terms other than the forum-selection clause, and the fact that he did not negotiate the contract before he accepted it. This argument fails as well. Feldman can demonstrate neither procedural nor substantive unconscionability, though he must prove both to prevail. Moreover, even if he could somehow demonstrate that a provision of the contract was unenforceable, the contract contains a severability clause under which unenforceable terms may be modified or stricken. The forum-selection clause would still remain in force.

Feldman is a sophisticated attorney who, according to his website, litigates cases across the country, including "recently serv[ing] as lead counsel in . . . Novacheck v. CIGNA (C.D. Cal. 95-3566)," a case pending in Los Angeles. He alleges that he chose to advertise with Google, and agreed to litigate any disputes in California. The Court should now enforce the contract's forum-selection clause.

II. PROCEDURAL BACKGROUND

Feldman filed his original complaint in this action in the Court of Common Pleas on March 9, 2006. That complaint, which Feldman verified under penalty of perjury, alleges that he entered into a contract with Google, and attaches a copy of the contract. The contract contains a forum-selection clause that requires disputes to be litigated in Santa Clara County, California. *See* Complaint Ex. A at ¶ 7.

Google removed the action to this Court on diversity grounds. It then moved to dismiss due to the forum-selection clause.[1] The Court held a hearing on November 1, 2006, and requested additional information, including whether Feldman had been shown the contract before, or after, he purchased advertising on Google. On November 16, Google submitted the Affidavit of Annie Hsu, which explains that advertisers are shown the contract before they purchase any advertising, and moreover, that they must accept the contract by clicking "**Yes,** I agree to the above terms and conditions" before they purchase any advertising. The Affidavit also explains that Google takes various steps to ensure that the contract is short and easy to read.[2]

Meanwhile, in an effort to bypass the forum-selection clause, Feldman filed an amended complaint. The amended complaint omits the breach-of-contract claim that Feldman pled in his original verified complaint, and replaces it with a claim for breach of *implied* contract. Thereafter, Feldman filed his motion requesting "summary judgment" that the contract is unenforceable due to the "take it or leave it" nature of the contract, and the supposed unfairness of various terms other than the forum-selection clause.

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[1] A copy of Google's Memorandum of Law in support of its motion to dismiss the amended complaint is attached hereto as Exhibit A.

[2] A copy of Ms. Hsu's Affidavit is attached hereto as Exhibit B.

III. ARGUMENT

A. Feldman has failed to show that the contract is unenforceable.

Since the forum-selection clause itself is plainly enforceable, Feldman now argues that the *entire* contract should be held unenforceable. Motion for Summary Judgment at 2. Thus, he asserts that the forum selection clause is void by virtue of its inclusion in a "take it or leave it" contract, which he contends is necessarily unconscionable. But courts routinely enforce standardized form contracts—indeed, they must do so, given the prevalence and importance of such contracts.[3] Moreover, if in fact any provisions of the contract were unenforceable (which they are not), they could be modified or severed under the contract's severability clause. Whether any such modification or severance should occur is a matter to be decided by the court in the parties' agreed forum, after dismissal of the action in this forum.

1. Feldman has established neither the procedural nor substantive elements necessary to find the Adwords Agreement unconscionable.

In order to render a contract unconscionable, a litigant must show "the absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 767 (1989); *Hornberger v. General Motors Corp.*, 929 F. Supp. 884 (E.D. Pa. 1996). In other words, courts require a showing of *both* procedural and substantive unconscionability. *See Koehl v. Verios, Inc.*, 142 Cal. App. 4th 1313, 1339 (2006); *Ostroff v. Alterra Heathcare* Corp., 433 F. Supp. 2d 538, 542 (E.D. Pa. 2006). The party challenging the contractual provision has the burden of proving unconscionability. *See Crippen v. Cent. Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1165 (2004). Feldman has failed to establish either element.

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[3] For decades, courts have recognized that "[m]ost contracts which govern our daily lives are of a standardized character. We travel under standard terms, by rail, ship, aeroplane, or tramway. We make contracts for life or accident assurances under standardized conditions. We rent houses or rooms under similarly controlled terms; authors or broadcasters, whether dealing with public or private institutions, sign standard agreements; government departments regulate the conditions of purchases by standard conditions." *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (1961) (internal quotation marks omitted).

a. The contract is not procedurally unconscionable.

For the procedural element of unconsionability, California courts focus on: (1) "oppression," which refers to an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice; and (2) "surprise," which occurs when supposedly agreed-upon terms of the bargain are hidden. *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 767 (1989).[4] Courts routinely consider numerous other relevant factors, including the buyer's sophistication, whether negotiation was attempted, the use of high-pressure tactics or external pressure to induce acceptance, as well as the availability of alternative sources of supply from which to obtain desired goods and services. *See, e.g., id.*, at 767-69; *Dabney v. Option One Mortg. Corp.*, 2001 WL 410543, at *4 (E.D. Pa. Apr. 19, 2001); *DeJohn v. The .TV Corporation Int'l,* 245 F.Supp.2d 913, 919 (N.D. Ill 2003); *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 451-52 (E.D.N.Y. 2004).

Thus, although the ability to negotiate is pertinent to the issue of procedural unconscionability, the analysis only begins—and by no means ends—with an inquiry into negotiability. *See Koehl v. Verio, Inc.* 142 Cal. App. 4th 1313, 1339 (2006); *see also, Rosenfeld v. Port Authority of New York and New Jersey*, 108 F. Supp. 2d 156, 164 (E.D.N.Y. 2000) (An "agreement cannot be considered procedurally unconscionable, or a contract of adhesions, simply because it is a form contract."); *Dabney v. Option One Mortg. Corp.*, 2001 WL 410543, at *4 (E.D. Pa. Apr. 19, 2001) (finding that "take it or leave it" arbitration agreement was not procedurally unconscionable where homeowner had sufficient disclosure of information, failed to submit evidence that she attempted to negotiate standardized terms, and had alternative sources for financing services.); *DeJohn v. The .TV Corporation Int'l,* 245 F.Supp.2d 913, 919 (N.D. Ill 2003) (finding online domain registration agreement was not unconscionable contract of adhesion where purchaser clicked the box stating that he had read, understood, and agreed to express terms, and had the option of retaining domain registration services elsewhere).

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[4] The contract states that it is to be governed by California law. *See* Complaint, Ex. A at ¶ 7. Pennsylvania law is similar to California's, also requiring an "absence of meaningful choice on the part of one of the parties." *Ostroff*, 433 F. Supp. 2d at 538.

For this reason, this Court and others have routinely enforced contracts that were not negotiated. *See, e.g., Travelers Indemnity Company v. Centlivre*, 1992 WL 163321, at *5 (E.D.Pa. July 7, 1992) (Giles, J.) (upholding a forum-selection clause in a form bond agreement that was not the subject of specific bargaining, citing *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 592 (1992)).

Here, every factor militates against a finding of procedural unconscionability. First, Plaintiff does not allege any "surprise" from hidden or undisclosed terms; it is undisputed that the Adwords agreement was a short seven paragraph (three page) document, drafted in plain, unmistakable English and in normal 12-point type. Second, Plaintiff is a sophisticated purchaser. He is an attorney who touts himself as a pioneer in numerous areas, including computer law, internet law, and consumer class actions,[5] and is fully capable of understanding the plain language terms of the AdWords agreement. Third, Feldman does not allege, nor could he, that he was under any high-pressure tactics or external pressure to accept the agreement.

Finally, there are ample alternative sources for advertising services, including similar online search-related advertising offered by Google's many competitors, such as MSN Search, AOL Search, Ask.com, Yahoo!, Excite, Infospace, and HotBot, just to name a few. Moreover, Feldman could have promoted his legal services by means other than on-line advertisements. The existence of these reasonably available market alternatives "tends to defeat any claim of unconscionability" as the buyer retains a "'meaningful choice' to do business elsewhere." *Dean Witter Reynolds, Inc.*, 211 Cal. App. 3d at 768-71 (holding that a termination fee charged by financial services provider was not unconscionable as to sophisticated investor-attorney where attorney failed to show lack of competitor services free from the allegedly unconscionable fee); *see also Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 614 (1988) (exculpatory clause in contract for use of motorcycle park not unconscionable where plaintiff presented no evidence that he could not have ridden his motorcycle elsewhere). Courts in this district have recognized the same principle, and affirmed that a standardized, non-negotiable contract may be improperly

[5] http://www.leflaw.com/ ("Since 1982, Lawrence E. Feldman & Associates has been a pioneer in computer law, internet law, consumer class actions, mass torts, civil rights, copyright and trademark, entertainment law and related areas.")

adhesive only "under such conditions that [the] consumer cannot obtain [the] desired product or services except by acquiescing [to the] form contract." *Dabney v. Option One Mortg. Corp.*, 2001 WL 410543, at *4 (E.D. Pa. Apr. 19, 2001) (citations omitted). *See also Denlinger, Inc. v. Dendler*, 608 A.2d 1061, 1068 (Pa. Super. 1992) (where seller was not exclusive supplier of rare or much-sought-after goods, buyer retained meaningful choice to seek supplies elsewhere); *Vasilis v. Bell of Pennsylvania*, 598 A.2d 52, 54 (Pa. Super 1991); (reiterating that where "a contract provision affects commercial entities with meaningful choices at their disposal, the clause in question will rarely be deemed unconscionable.").

In sum, Feldman is a sophisticated and knowledgeable buyer, who presents no evidence that any terms were surprising or that he faced any high-pressure tactics to accept the Adwords agreement. Moreover, as in the cited cases, if Feldman found terms of the Adwords agreement unacceptable, he retained the meaningful choice to reject the contract and expend his advertising dollars on a multitude of similar web-based advertising services or other services. Feldman has failed to demonstrate procedural unconscionability.

b. There is no substantive unconscionability.

Because the Plaintiff failed to satisfy the procedural element, this Court need not reach the second prong of the inquiry concerning the substantive element. Nevertheless, consideration of Plaintiff's arguments for substantive unconscionability reveal that they are meritless too.

The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided" results so as to "shock the conscience." *Aron v. U-Haul Co. of California*, 143 Cal. App. 4th 796, 808 (2006) (citations omitted); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) ("Substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent."). None of the provisions highlighted by Plaintiff in his Motion approach these high standards.

First, Plaintiff contends that the forum selection clause unreasonably favors Google insofar as it requires that billing disputes be adjudicated in California. Motion for Summary Judgment at 5. Such reasoning, if adopted, would effectively invalidate all forum selection clauses, and plainly contradicts settled Supreme Court jurisprudence. In enforcing a standardized, non-negotiable forum selection clause, the Supreme Court held that a cruise line has a special interest in limiting fora in which it potentially could be subject to suit, particularly because it operates in many locales and thus could be subject to suit in many different locations. *Carnival Cruise Lines, Inc.* 499 U.S. at 593-94. The forum selection clause also served to dispel confusion about where suits may be brought, sparing litigation costs and judicial resources associated with the inevitable flurry of jurisdictional motions. *Id.* Finally, the Supreme Court added that purchasers likely benefited by reduced fares, which would reflect savings the cruise line enjoys by limiting the fora in which it may be sued, *id.*, a point which this Court has reiterated in repeatedly upholding forum selection clauses. *See Anastasi Brothers Corp. v. St. Paul Fire and Marine Ins. Co.*, 519 F. Supp. 862, 863-4 (E.D. Pa. 1981) (Giles, J.); *Travelers Indemnity Company v. Centlivre*, 1992 WL 163321, at *5 (E.D. Pa. July 7, 1992) (Giles, J.). Such factors apply with even great force to Google's Adwords advertising services, which are offered to many thousands of customers located all over the world.[6]

Plaintiff next contends that "based on the evidence submitted [in Google's pleadings], "this Court cannot say with certainty that the [Adwords agreement] was not one of adhesion." Motion for Summary Judgment at 5. Not only is this unexplained assertion inaccurate (as addressed above), it misuses the standard employed for a motion for summary judgment and also wrongfully shifts the burden for proving unconscionability, which remains on the Plaintiff. Moreover, it refers to factors associated with procedural unconscionability, which are irrelevant to this substantive element inquiry.

Next, Feldman contends that certain other provisions in the contract are substantively unconscionable. For the sake of completeness, Google addresses each of these provisions below. Google emphasizes, however, that these matters should appropriately be decided by the court in the parties' agreed forum. This Court need not and should not address these other provisions before granting Google's motion to dismiss.

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[6] Plaintiff's assertion of undue burden due to health-related travel restrictions are, as a matter of law, irrelevant to the issue of unconscionability, which focuses on the unfairness of the actual terms of the agreements at the time the contract was entered into. *See Aron v. U-Haul Co. of California*, 143 Cal. App. 4th at 808. Google addresses these concerns below.

First, Feldman contends that a 60-day window within which to dispute charges is unconscionable. Motion for Summary Judgment at 5-6. This contention fails. It is well established that contractual limitations periods are valid so long as the period for bringing claims is reasonable. *See Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 608 (1947); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir. 1995) ("California permits contracting parties to agree upon a shorter limitations period for bringing an action than prescribed by statute, so long as the time allowed is reasonable."). And California courts have frequently upheld contractual limitations period of similar length. *See, e.g., Levitsky v. Farmers Ins. Group of Companies*, 2002 WL 1278071, at *4, (Cal. App. 1 Dist., 2002) (finding that a 60-day limitation within which to file medical bills or claims is not unconscionable); *Pacific Coast Co. v. Yukon Independent Transp. Co.*, 155 F. 29 (9th Cir. 1907) (upholding requiring claims within 60 days after notice of damage or loss); *Capehart v. Heady*, 206 Cal. App. 2d 386 (1962) (concluding that three-month limitation period in lease was not unreasonable); *Ward v. System Auto etc. Garages, Inc.*, 149 Cal.App.2d Supp. 879, 880-81 (1957), disapproved on other grounds in *California State Auto. Assn. Inter-Ins. Bureau v. Barrett Garages, Inc.*, 257 Cal. App. 2d 71, 78-79 (1967)) (upholding 90-day limitation for claims arising out of bailment contracts).

Google's 60-day window is reasonable, striking the appropriate balance between the customer's ability to identify and report any billing errors and Google's ability to manage the enormous amounts of data and transactions associated with its Adwords services. Customers are afforded two full months to review bills for any irregularities. And the two-month window allows Google to reasonably limit the amount of resources it must devote to record, process, and manage each of many millions of clicks, as well as the many thousands of customer accounts affected by them. There is no basis to strike this provision.[7]

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[7] Again, Plaintiff's cases are easily distinguished. *Anthony v. Alexander Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003) considered only a 30-day window to raise *any* claim arising out of a full employment agreement. Google's window is twice as long and covers only certain specified disputes. *See* Agreement ¶ 5 (waiving only "claims related to charges"). *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002), considered a contractual limitation to state Fair Employment and Housing Act claims that would serve to deprive plaintiffs of the "continuing violation" doctrine, a judicially-created doctrine deemed necessary in light of the evidentiary

Next, Feldman protests a series of provisions from the Adwords agreement, including a warranty disclaimer and the exercise of Google's discretion in offering refunds. Motion for Summary Judgment at 6. Feldman cites no case law supporting his contention that these provisions are substantively unconscionable, nor could he, since they are entirely reasonable. Nothing about these commonplace terms "shocks the conscience," as required under California law.[8]

2. Even if a particular provision were unenforceable, the severability clause provides that the remaining provisions remain in full force.

As set forth above, Feldman has failed to establish the procedural or substantive elements of unconscionability of any of the contractual provisions. But even if he had done so, the contract contains a severability clause which provides that any unenforceable clause will be modified or severed. *See* Complaint Ex. A (Contract) at ¶ 7 ("Unenforceable provisions will be modified to reflect the parties' intention, and remaining provisions of the Agreement will remain in full effect."). Thus, even if Feldman's challenges to the various terms other than the forum-selection clause had merit (which they do not), Google's motion to dismiss still should be granted.

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complexity of discrimination cases. *See Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 812-18 (2001). The Adwords limitation effect only billing disputes, not discrimination claims, and does not seek to roll-back judicially-created doctrines.

[8] For these reasons, courts have consistently upheld Google's contracts, including their forum-selection clause. For example, in *Person v. Google, Inc.*, F. Supp. 2d, 2006 WL 2884444 (S.D.N.Y., October 11, 2006), the Southern District of New York considered the same AdWords contract that is at issue here. The court held that the forum-selection clause in the contract is fundamentally fair, and accordingly, ordered the case to be transferred from New York to San Jose, California, which is in Santa Clara County, the forum that the contract specifies. *Id.* at *3-*8. Likewise, in *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446 (E.D.N.Y. 2004), the court considered Google's contract for Google Groups, an on-line discussion group service, which is presented to the user in a manner similar to how the AdWords contract is presented to advertisers. *See id.* at 451. The court held that the forum-selection clause in the contract is valid and enforceable, and dismissed the relevant claims without prejudice to be renewed in an appropriate venue. *Id.* at 451-52. In contrast, *no* court has held that the AdWords or Google Groups contract is unenforceable, as Feldman asks this court to do.

B. Feldman's non-contractual claims are subject to the forum-selection clause.

In an alternative attempt to circumvent the contractual forum-selection clause, Feldman amended his verified complaint, replacing his legal breach-of-contract claim with one for breach of *implied* contract. Under well settled law, this tactic fails

In *DeJohn v. The .TV Corporation Int'l,* 245 F.Supp.2d 913, 918 (N.D. Ill 2003), the court rejected the same argument under surprisingly similar circumstances. In opposing a motion to dismiss for improper venue based on a forum selection clause, the plaintiff, who had agreed to an online domain-registration contract with Register.com, sought to avoid dismissal by arguing that the "take it or leave it" online agreement was an unconscionable adhesion contract. Thus, the plaintiff contended that their relationship was governed by an implied contract. The *DeJohn* court rejected the attempt to circumvent the contract's express terms, recognizing that "the existence of an enforceable contract governing a particular transaction precludes recovery under an implied contract related to the same transaction." *See DeJohn v. The .TV Corporation Int'l,* 245 F.Supp.2d at 918. Similarly, here, Feldman alleges under penalty of perjury that on or about January 2003, he agreed to be bound by an express Adwords agreement. This precludes any implied contract.

Indeed, it is well settled under California law and in the Third Circuit that a litigant cannot circumvent a forum-selection clause by pleading alternate non-contractual claims if those claims arise out of the contractual relation and implicate the contract's terms. *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988) (applying forum selection clause to claims of RICO violations, fraud, unfair competition and tortious interference); *Smith, Valentino & Smith, Inc. v. Superior Court,* 17 Cal. 3d 491, 497 (1976) (holding that unfair competition and intentional business interference arose out of contractual relationship and thus were subject to contracts forum selection clause). As the Third Circuit recognized in *Crescent*, if the ploy that Feldman has attempted here were effective, a litigant could avoid "a forum selection clause by simply pleading non-contractual claims." 857 F.2d at 944-45.

Here, all of Feldman's claims arise out of his alleged purchase of AdWords advertising from Google, which is governed by the contractual relationship. Thus, all these claims fall under the forum-selection clause, whether or not they are couched in the language of the contract.

C. Feldman's health considerations do not preclude litigation in the parties' agreed forum.

Feldman also argues that the Court should not enforce the contractual forum-selection clause because his health is impaired and his ability to travel is currently restricted. While Google will of course make appropriate accommodations for legitimate health concerns, this is not a basis to deny enforcement of the forum-selection clause.

First, it should be noted that, by his own account, Feldman still maintains a thriving law practice. His website, www.leflaw.com, states that he currently represents clients in matters pending in Georgia, Delaware, Maine, and other venues; that he serves as co-counsel in a class action pending in San Diego, California (*Hapner v. Sony Electronics, Inc.*, Case No. GIC839244); and that he "recently served as lead counsel" in a case pending in federal court in Los Angeles. Obviously, his firm should bring no fewer resources to bear in this case than it does in its other matters.

Second, Feldman will not be required to travel to California if his health will not permit it. His firm has been represented in this Court by another one of its attorneys, and it may continue to do so in the California court. Attorneys also may appear telephonically. Any discovery involving Mr. Feldman, such as his deposition, could occur near his home, in a manner that accommodates any existing health restrictions. And if this matter proceeds to trial, appropriate accommodations could be made to take Mr. Feldman's testimony if any health-related travel restrictions still exist. In short, none of Feldman's concerns warrants denying enforcement of the contract's forum-selection clause. *See, e.g., Ferketich v. Carnival Cruise Lines*, 2002 WL 31371977 at 6 (E.D.Pa. Oct. 17, 2002) (holding that although plaintiff "is 75 years old and experiences difficulty in traveling, this inconvenience is not severe enough to demonstrate that litigating in Florida will 'be so manifestly and gravely inconvenient' for her that she will be deprived her day in court."); *Falcone v. Mediterranean Shipping Co.*, 2002 WL 32348270 (E.D.Pa. Apr. 3, 2002) (holding that Italy is not so inconvenient a forum as to justify invalidation of a forum selection clause); *Drucker's, Inc. v. Pioneer Electronics (USA), Inc.*, 1993 WL 431162 (D.N.J. Oct. 20, 1993) (holding that dismissal with leave to commence action in California is not so onerous as to justify invalidating forum selection clause).

IV. CONCLUSION

For the foregoing reasons, and those set forth in Google's pleadings and argument in support of its Motion to Dismiss, the Court should enforce the parties' agreement and dismiss this action without prejudice, to allow it to proceed in forum specified in the contract.

Respectfully submitted,

LINDY & ASSOCIATES, P.C.

By: **/s/ Jeffrey M. Lindy**
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Attorneys for defendant,
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Dated: January 8, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAWRENCE E. FELDMAN, d/b/a/ LAWRENCE E. FELDMAN and ASSOCIATES, Plaintiff,	:	
v.	:	CIVIL ACTION NO. 06-cv-2540
GOOGLE, INC., Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF DEFENDANT GOOGLE, INC., TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(6)

Defendant Google, Inc. ("Defendant" or "Google"), submits the following Memorandum of Law in support of its Motion to Dismiss the Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6).

I. INTRODUCTION

Plaintiff Lawrence Feldman, d/b/a Lawrence Feldman & Associates ("Plaintiff" or "Feldman"), alleges that he contracted with Google to purchase advertisements on the Internet, and that Google breached the contract and violated other laws by overcharging him for those ads. The contract in question, which is attached to the original Complaint, contains a forum-selection clause which requires that any dispute "must be . . . adjudicated in Santa Clara County, California." *See* the original Complaint and Contract attached hereto as Exhibit A, Contract at ¶7.

As this Court has observed, forum-selection clauses must be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that the party seeking the non-contractual forum will for all practical purposes be deprived of his day in court." *Anastasi Bros.*

Corp. v. St. Paul Fire and Marine Ins. Co., 519 F. Supp. 862, 863 (E.D.Pa. 1981) (Giles, J.), *quoting M/S Bremen v. Zapata OffShore Co.*, 407 U.S. 1, 18 (1972). Feldman -- an attorney who litigates on behalf of clients in California -- can readily proceed in Santa Clara County, California, as the contract requires him to do. Because Feldman sued in the wrong forum, the Court should dismiss this action.

II. PROCEDURAL HISTORY

On or about March 9, 2006, Feldman commenced this lawsuit by filing a writ of summons in the Philadelphia Court of Common Pleas, naming Google as a defendant. On or about June 5, 2006, Feldman filed his original Complaint in the Court of Common Pleas. In his Complaint, Feldman alleged damages in excess of $100,000. Given the diversity of citizenship, Google filed a timely Notice of Removal pursuant 28 U.S.C. §1332. To enforce the parties' contractually chosen forum selection clause, Google then filed a Motion to Dismiss. In an apparent attempt to circumvent this Court's jurisdiction, Feldman then filed an Amended Complaint, reducing his demand for damages to "approximately $50,000."[1]

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[1] While Feldman apparently hopes to divest the Court of jurisdiction by revising his damage allegation, he has not moved to remand. If he does, that motion would be meritless. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999) (holding that "the amount in controversy is measured as of the date of removal, a practice similar to that in original jurisdiction suits where the inquiry is directed to the time when the complaint is filed"), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546 (2005). *See also Kobaissi v. American Country Ins. Co.*, 80 F.Supp.2d 488, 489 (E.D.Pa. 2000) (noting that "the amount in controversy is determined as of the date of removal, that is, a plaintiff may not subsequently amend a complaint so as to defeat federal jurisdiction."); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871-72 (6th Cir. 2000) (holding that a post-removal stipulation reducing the amount in controversy to below the required jurisdictional amount is ineffective to deprive a district court of jurisdiction); *Allen v. R&H Oil*, 63 F.3rd 1326, 1336 (5th Cir. 1995) ("Once the district court found that it had jurisdiction, the jurisdiction is deemed to have vested in the court at the time of removal. An amendment to the complaint limiting damages for jurisdictional purposes cannot divest jurisdiction.").

Because Feldman's Amended Complaint is subject to dismissal just as his original Complaint was, Google now renews its Motion to Dismiss.

III. RELEVANT ALLEGATIONS IN THE AMENDED COMPLAINT[2]

Feldman is a personal-injury attorney who entered into a contract to use Google's AdWords program in January 2003. *See* Amended Complaint, ¶ 5. AdWords is a form of Internet advertising. It allows advertisers to bid against each other to have their ads displayed when Internet users type selected keywords in their searches. The advertiser then pays Google each time a user clicks on its ad. *See* Amended Complaint, ¶¶ 6-9. Feldman used the AdWords program to display ads for his law firm associated with the keywords "Vioxx," "Celebrex," and "Bextra," in an effort to attract personal-injury plaintiffs to sue the manufacturers of those drugs. *See* Amended Complaint, ¶¶ 7 and 18.

Feldman's contract with Google requires disputes to be adjudicated in California. Paragraph 7 of the agreement provides:

> 7. **Miscellaneous**. The Agreement must be . . . governed by California law, except for its conflict of law principles ***and adjudicated in Santa Clara County, California.***

See Exhibit A, Contract at ¶ 7 (emphasis added). Despite this requirement, Feldman sued Google in the Court of Common Pleas of Philadelphia County, Pennsylvania, alleging that Google overcharged him by more than $100,000. Google removed the case to this Court pursuant to the Court's diversity jurisdiction and filed a Motion to Dismiss. Feldman filed an Amended Complaint, and now Google renews its Motion to Dismiss to enforce the contract's forum-selection clause.

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[2] As Rule 12(b)(6) requires, for the purpose of this Motion, Google assumes that the facts alleged in the amended Complaint are true. *Hedges v. United States*, 404 F.3d 744, 750 (3rd Cir. 2005).

IV. ARGUMENT

A. This case should be dismissed because Feldman sued in the wrong forum.

The Third Circuit has repeatedly held that a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is an appropriate procedural mechanism for enforcing a forum-selection clause. *Salovaara v. Jackson Nat. Life Ins. Co.*, 246 F.3d 289, 297-99 (3d Cir. 2001) (holding that "a 12(b)(6) dismissal is a permissible means of enforcing a forum selection clause"); *Wall Street Aubrey Golf, LLC v. Aubrey*, 2006 WL 1525515 at 1 n.1 (3d Cir. June 5, 2006) (same). Dismissal is appropriate here because Feldman cannot meet his burden of showing that the forum-selection clause in the Google contract is unenforceable.[3]

"Because forum selection clauses are presumptively valid, the party objecting to enforcement of the clause bears the 'heavy burden ... of proving that enforcement would be unreasonable and unjust'" under the circumstances. *In re Diaz Contracting, Inc.*, 817 F.2d 1047, 1052 (3d Cir.1987), *quoting M/S Bremen v. Zapata OffShore Co.*, 407 U.S. 1, 15 (1972). *See also Anastasi Bros. Corp., supra,* 519 F. Supp. at 863 (Giles, J.) (observing that forum-selection clauses should be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that the party seeking the non-contractual forum will for all practical purposes be deprived of his day in court.").

To overcome a forum-selection clause, the party objecting to the contractual forum must establish, (1) that the clause is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement, in the particular circumstances of the case, would be so unreasonable that it would deprive a litigant of his day in court. *Coastal Steel v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983). *See also Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1219 (3d Cir. 1991) (same). Feldman cannot meet any of these burdens.

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[3] As an alternative remedy, pursuant to 28 U.S.C. §1404(a), this Court in its discretion may transfer the case to the U.S. District Court for the Northern District of California, whose San Jose Division is located within Santa Clara County.

1. The parties' forum selection-clause was not the product of fraud or overreaching.

"[T]he mere allegation of fraudulent conduct does not suspend operation of a forum selection clause. Rather, the proper inquiry is whether the forum selection clause is the result of 'fraud in the inducement of the [forum-selection] clause itself.'" *MoneyGram Payment Systems, Inc. v. Consorcio Oriental, S.A.*, 2003 WL 21186124 (3d Cir. May 21, 2003), *citing Prima Paint Corp. v. Flood & Conklin Mgf. Co.*, 388 U.S. 395, 403-04 (1967). Feldman can provide no evidence that he was fraudulently induced into agreeing to a forum selection clause as part of his AdWords contract.[4]

Nor can he prove that the clause was the product of overreaching. The typical case for invalidating a forum-selection clause as a result of overreaching occurs when unsophisticated consumers, who possess no bargaining power, enter into contracts of adhesion with powerful corporations. *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 360 (3d Cir. 1986). Frequently, the clause is written in fine print and in complicated language inaccessible to an unsophisticated customer. *See BABN Technologies Corp. v. Bruno*, 25 F. Supp.2d 593, 595-96 (E.D.Pa.1998) (holding that a forum selection clause is not a product of fraud or overreaching where it is "written in plain English and is located in uniform type directly above [the party's] signature line in the agreement.").

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[4] In his amended Complaint, Feldman included a new cause of action for so-called "Fraudulent Inducement." *See* Amended Complaint at Count III. Notably, however, nowhere does Feldman allege particularized facts showing fraud in the inducement of the forum-selection clause itself, as the law requires. *Id. See also* Fed.R.Civ.P. 9(b). Accordingly, these new allegations have no bearing on the enforceability of the forum-selection clause.

Feldman is far from an unsophisticated consumer. He is an attorney who touts his ability to defeat large pharmaceutical companies in complex products-liability litigation; he is fully capable of understanding the consequences of signing an agreement that requires disputes to be adjudicated in California. In such circumstances, courts routinely uphold the validity of forum-selection clauses. *General Engineering Corp., supra,* 783 F.2d at 360 (holding that such a contract provision is valid where "[b]oth parties ... are sophisticated business entities capable of understanding and adjusting for the risks associated with a forum selection clause.").

Finally, the forum selection clause was drafted in plain, unmistakable English and in normal type, further evidencing the fact that this contractual provision was not the product of coercion or overreaching. *See BABN Technologies, supra,* 25 F. Supp.2d at 595-96.

2. Enforcement of the forum-selection clause will not violate public policy.

Courts in the Third Circuit have routinely held that enforcement of forum-selection clauses in circumstances like these does not violate public policy. If anything, enforcement of the clause will advance public policy by giving force and effect to the parties' agreement. *See Source Buying Group, Inc. v. Block Vision, Inc.*, 2000 WL 62972 (E.D.Pa. Jan. 14, 2000) (Giles, J.), *citing Jumara v. State Farm Ins. Co.,* 55 F.3d 873, 879 (3d Cir.1995) (while deference "should be afforded to the plaintiff's initial selection of forum (evinced by where the action is originally filed), 'a forum selection clause is treated as a manifestation of the parties' preference as to a convenient forum."). For this reason, courts in this Circuit, and elsewhere, routinely enforce the type of forum selection clause at issue here. *See, e.g., Hodes v. S.N.C. Achille Lauro ed Altri-Gestione,* 858 F.2d 905, 915 (3d Cir.1988) (holding that the practice of ignoring forum selection clauses "would be to revisit the 'parochialism' and 'provincialism' that the Supreme

Court decried in [the] *Bremen* [case]"). [5]

Furthermore, given that the court that presides over this case must apply California law, it is entirely appropriate to defer the adjudication to a California forum. *Falcone v. Mediterranean Shipping Co.*, 2002 WL 32348270 (E.D.Pa. Apr. 3, 2002) (dismissing case based on a forum-selection clause where foreign forum would be better at interpreting its own laws); *Hoffer v. InfoSpace.com, Inc.*, 102 F. Supp.2d 556, 577 (D.N.J. 2000) (transferring case from New Jersey to Washington State, in part, because the Washington courts are in a better position to interpret Washington law which would govern the case); *Suhre Associates, Inc. v. Interroll Corp.*, 2006 WL 231675 at 2 (D.N.J. Jan. 31, 2006) (holding it more appropriate to litigate the action in North Carolina, where the courts will be more familiar with the relevant North Carolina state law).

3. Enforcement of the forum-selection clause will not deprive Feldman of his day in court.

Adjudicating this case in California will not be so inconvenient as to deprive Feldman of his ability to litigate the case. While Feldman may claim an increased burden in litigating the matter in California, "[m]ere inconvenience or additional expense is not the test of unreasonableness, since it may be assumed that the [Plaintiff] received under the contract consideration for these things." *Anastasi Bros. Corp., supra,* 519 F. Supp. at 864 (Giles, J.), *citing Central Contracting Co. v. Maryland Cas. Co.,* 367 F.2d 341, 344 (3d Cir.1966).

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[5] *See also Salovaara v. Jackson Nat. Life Ins. Co.*, 246 F.3d 289, 297-98 (3d Cir. 2001) (holding the dismissal of case appropriate in the context of a forum selection clause mandating the resolution of disputes in the State of New York); *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988) (upholding dismissal of case in the face of a forum selection clause that mandated resolution of disputes in Miami, Florida); *Wall Street Aubrey Golf, LLC v. Aubrey*, 2006 WL 1525515 at 1, n.1 (3d Cir. June 5, 2006) (upholding dismissal of case where forum selection clause directs litigation in Pennsylvania state court); *Dentsply Intern., Inc. v. Benton,* 965 F. Supp. 574 (M.D.Pa. 1997).

Thus, courts have repeatedly held that the financial hardships of litigating the case in another forum will not justify voiding an otherwise valid forum selection clause. *See Commerce Commercial Leasing, LLC v. Jay's Fabric Center*, 2004 WL 2457737 (E.D.Pa. Nov. 2, 2004), *citing Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966). *See also Ferketich v. Carnival Cruise Lines*, 2002 WL 31371977 at 6 (E.D.Pa. Oct. 17, 2002) (holding that although plaintiff "is 75 years old and experiences difficulty in traveling, this inconvenience is not severe enough to demonstrate that litigating in Florida will 'be so manifestly and gravely inconvenient' for her that she will be deprived her day in court."); *Falcone v. Mediterranean Shipping Co.*, 2002 WL 32348270 (E.D.Pa. Apr. 3, 2002) (holding that Italy is not so inconvenient a forum as to justify invalidation of a forum selection clause); *Drucker's, Inc. v. Pioneer Electronics (USA), Inc.*, 1993 WL 431162 (D.N.J. Oct. 20, 1993) (holding that dismissal with leave to commence action in California is not so onerous as to justify invalidating forum selection clause).

Indeed, such a claim by Feldman would ring particularly hollow considering that he chooses to litigate other matters in the California courts. For example, Feldman's web site, www.leflaw.com, states that he is counsel of record in a class action titled *Hapner v. Sony Electronics, Inc.*, Case No. GIC839244, filed in 2005, and pending in San Diego, California.

Finally, there can be no dispute that California is a reasonable forum for litigating Plaintiff's claims. First, the alleged wrongful acts -- overcharging for Internet advertising -- occurred in California. Second, because Google is headquartered in California, the relevant documents and witnesses will almost certainly be located there as well. Third, not only do the California courts have a great deal of expertise in commercial litigation involving similar web-based technology, but Feldman has included a count in his Amended Complaint alleging that

Google violated the California Business and Professions Code, §17200. *See* Amended Complaint at Count VI, ¶¶ 47-53. Thus, it is clear that a California court is not only a reasonable forum, but also the correct forum for adjudicating this dispute.

Feldman freely and voluntarily chose to advertise with Google. He could have expended his advertising dollars somewhere else. Likewise, he could have attempted to negotiate a different forum for adjudicating disputes. But he did not. In entering into the contract, Plaintiff accepted its benefits as well as its obligations. Because the contract prohibits Feldman from suing in Pennsylvania, the Court should dismiss this action without prejudice, allowing him to proceed in Santa Clara County, California.

B. In the alternative, if the Court does not dismiss or transfer this matter, it should dismiss Feldman's unjust enrichment claim with prejudice.

Feldman has asserted claims for both breach of contract (Count I) and unjust enrichment (Count V). But California law, which controls this action, bars claims for unjust enrichment when the parties' relationship is governed by an express contract. *California Medical Ass'n, Inc. v. Aetna U.S. Healthcare of California, Inc.*, 94 Cal. App. 4th 151, 172 (2001). Pennsylvania law does the same. *See Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987) (holding that "the quasi-contractual doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract."); *Benefit Trust Life Ins. Co. v. Union Nat. Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir. 1985) (same).

Here, the parties entered into a written contract, and Feldman has sued Google for breaching that contract. *See* Exhibit A. Accordingly, he cannot sue under a theory of unjust enrichment.

V. CONCLUSION

For the foregoing reasons, Defendant Google, Inc., respectfully requests that this Court grant its Motion to Dismiss the Amended Complaint. Since this dismissal will be without prejudice, Plaintiff will be able to refile this matter in the proper forum, Santa Clara County, California. In the alternative, if this matter is not dismissed, Google requests that this Court dismiss with prejudice Plaintiff's claim for unjust enrichment as set forth in Count V of the Amended Complaint.

LINDY & ASSOCIATES, P.C.

By: **\s\ David J. Berney**

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Attorneys for Defendant,
Google, Inc.

DECLARATION OF GOOGLE, INC. REPRESENTATIVE ANNIE HSU

I, Annie Hsu, hereby declare and state as follows:

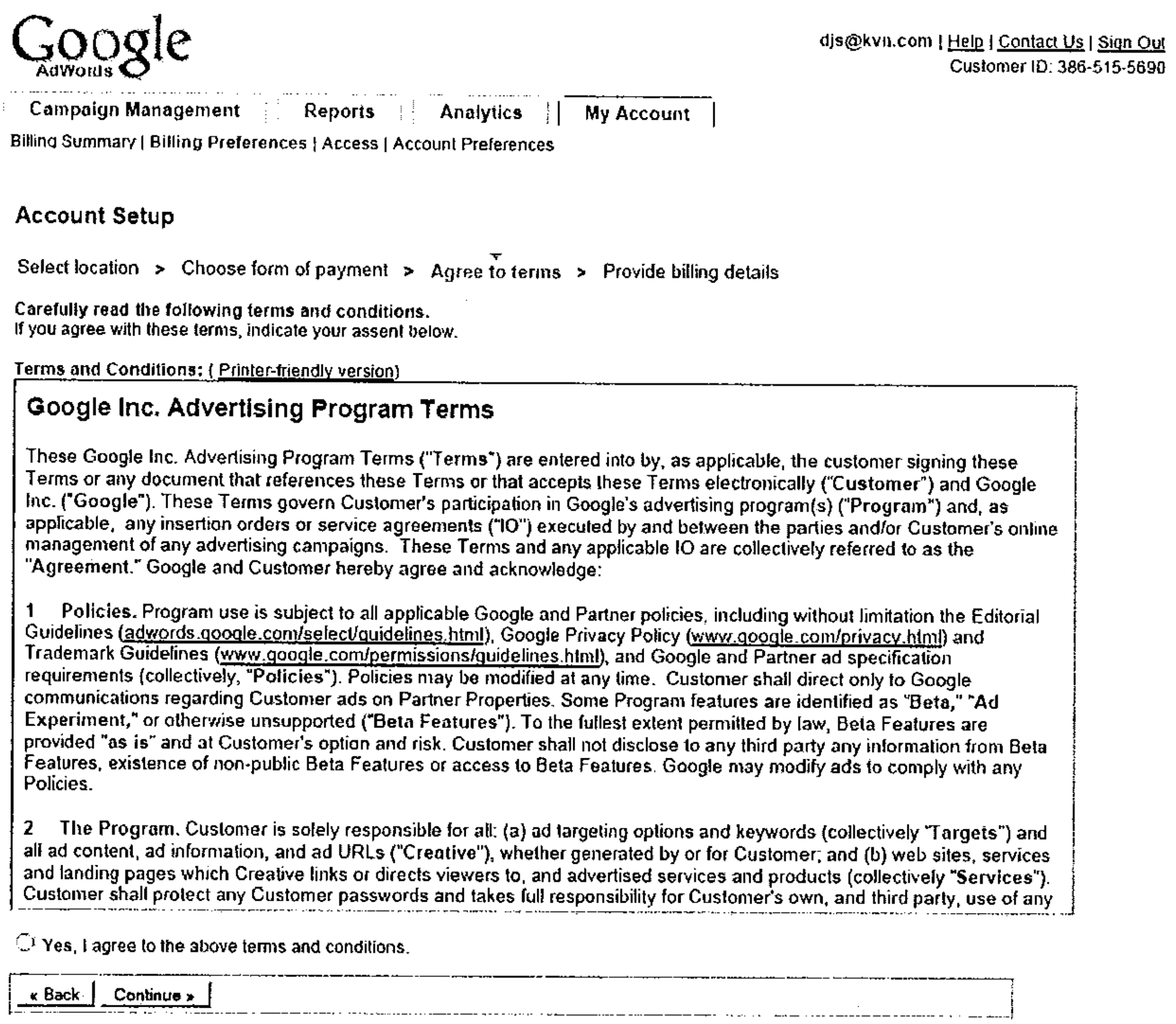
1. I am an AdWords Associate for Google, Inc. ("Google"). I have been employed by Google since June 2004. I make this declaration in support of Google's Motion to Dismiss the Amended Complaint in the matter captioned *Lawrence E. Feldman d/b/a Lawrence E. Feldman & Assocs. v. Google, Inc.*, Civil Action No. 06-cv-2540 (E.D. Pa.). I know the facts stated herein of my own personal knowledge, and if called to testify as a witness, I could and would do so competently and under oath.

2. Google's online advertising service that allows advertisers to create text- or image-based ads and to display them online in a targeted manner is called "AdWords." I understand that, in this action, plaintiff Feldman alleges that he was an AdWords advertiser. If so, he was required to enter into an AdWords contract *before* he placed any ads or incurred any charges.

3. When an advertiser wishes to open an AdWords account, he uses Google's on-line sign-up process. (Some very large advertisers do not use this on-line process, and instead interact directly with Google representatives, but those are exceptional cases which are not relevant here.) The on-line sign-up process, which is available through the website https://adwords.google.com/select/Login, guides the advertiser through a series of steps, and requires him to provide certain information or responses at each step in order to progress to the next step. In the first series of steps, the advertiser provides information such as the text of the ad he wishes to run, the search keywords that he wishes to target the ad to (terms like "digital camera" or "home mortgage," for example), and so forth. At the conclusion of these steps, the

advertiser may create an AdWords account. The account is inactive, however—and the advertiser *cannot* place any ads or incur any charges—until he performs several additional steps.

4. To activate the account, the advertiser must visit his account page, where he is shown a copy of the AdWords contract. Here is an image depicting what the advertiser sees:


Google AdWords

djs@kvn.com | Help | Contact Us | Sign Out
Customer ID: 386-515-5690

Campaign Management | Reports | Analytics | My Account

Billing Summary | Billing Preferences | Access | Account Preferences

Account Setup

Select location > Choose form of payment > Agree to terms > Provide billing details

Carefully read the following terms and conditions.
If you agree with these terms, indicate your assent below.

Terms and Conditions: (Printer-friendly version)

Google Inc. Advertising Program Terms

These Google Inc. Advertising Program Terms ("Terms") are entered into by, as applicable, the customer signing these Terms or any document that references these Terms or that accepts these Terms electronically ("Customer") and Google Inc. ("Google"). These Terms govern Customer's participation in Google's advertising program(s) ("Program") and, as applicable, any insertion orders or service agreements ("IO") executed by and between the parties and/or Customer's online management of any advertising campaigns. These Terms and any applicable IO are collectively referred to as the "Agreement." Google and Customer hereby agree and acknowledge:

1 **Policies.** Program use is subject to all applicable Google and Partner policies, including without limitation the Editorial Guidelines (adwords.google.com/select/guidelines.html), Google Privacy Policy (www.google.com/privacy.html) and Trademark Guidelines (www.google.com/permissions/guidelines.html), and Google and Partner ad specification requirements (collectively, "Policies"). Policies may be modified at any time. Customer shall direct only to Google communications regarding Customer ads on Partner Properties. Some Program features are identified as "Beta," "Ad Experiment," or otherwise unsupported ("Beta Features"). To the fullest extent permitted by law, Beta Features are provided "as is" and at Customer's option and risk. Customer shall not disclose to any third party any information from Beta Features, existence of non-public Beta Features or access to Beta Features. Google may modify ads to comply with any Policies.

2 **The Program.** Customer is solely responsible for all: (a) ad targeting options and keywords (collectively "Targets") and all ad content, ad information, and ad URLs ("Creative"), whether generated by or for Customer; and (b) web sites, services and landing pages which Creative links or directs viewers to, and advertised services and products (collectively "Services"). Customer shall protect any Customer passwords and takes full responsibility for Customer's own, and third party, use of any

○ Yes, I agree to the above terms and conditions.

« Back | Continue »

It is important to note that, on the actual account page, there is a scroll bar on the right side of the window depicted above that allows the advertiser to scroll through and read the entire contract, including the forum-selection clause that is at issue in Google's Motion to Dismiss. The scroll bar does not appear in the image above.

5. Google ensures that the AdWords contract is short and easy to read. The contract that plaintiff Feldman alleges he agreed to is just seven paragraphs long, plus a short pre-amble. *See* Complaint dated June 1, 2006, Ex. A. It is printed and displayed entirely in twelve-point type. The advertiser can quickly and easily scroll through the entire document in the window depicted above. Alternatively, as shown in the figure above, Google gives the advertiser the option to display a "Printer-friendly version" of the contract—one that fills the full screen, with all the other material on the page removed—which he can review on the screen, or, if he prefers, print so that he can review the document in paper form.

6. After Google presents the contract to the advertiser as shown in the figure above, the advertiser *must* click "**Yes,** I agree to the above terms and conditions" to progress to the next step. If the advertiser does not click "**Yes**, I agree to the above terms and conditions," pressing the "Continue" button will merely return him to the same page, with the "**Yes**, I agree to the above terms and conditions" button highlighted. Unless he agrees to the AdWords contract, the advertiser can never activate his account, which means that he can never place any ads or incur any charges.

7. I understand that plaintiff Feldman alleges he agreed to the AdWords contract in or around January 2003. Based on my work as an AdWords associate, I am familiar with how AdWords accounts were activated at that time, and the procedures described above were in place then. In short, if plaintiff Feldman ever advertised through the AdWords program, Google presented him with the AdWords contract, and he clicked the button to indicate that he agreed to the contract, *before* he placed any ads or incurred any charges.

I declare under penalty of perjury under the laws of the State of California and the Commonwealth of Pennsylvania that the foregoing is true and correct. Executed on this 16th day of November, 2006, at Santa Clara County, California.

ANNIE HSU

CERTIFICATE OF SERVICE

The undersigned, counsel for Lawrence E. Feldman & Associates hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Opposition to Defendant Google's Motion to Dismiss or to Transfer was sent via facsimile and first class mail this day to the following individual(s):

Jeffrey M. Lindy
1800 J.F.K. Boulevard, Suite 1500
Philadelphia, Pennsylvania 19103
Tel: 215.575.9290

Attorney for Defendant Google, Inc.

Date: 1/22/06

BY: ______________________
William E. Angle, Esquire